MALAYSIAN REPORTS

PUBLIC PROSECUTOR v. LIM SHUI WANG & ORS.

[F.C. (Suffian L.P., Gill C.J. (Malaya), Lee Hun Hoe C.J. (Borneo), Raja Azlan Shah and Wan Suleiman F.JJ.) May 15 and August 19, 1978]

[Kuala Lumpur — Federal Court Criminal Special Case No. 1 of 1977]

Criminal Law and Procedure — Transfer of case — Power of High Court Judge to transfer case from High Court to subordinate court — Power given to Attorney-General to choose forum for criminal trial — Overrides power of High Court — Dangerous Drugs, Ordinance, 1952, ss. 39 and 41A — Courts of Judicature Act, 1964, ss. 25(2), 48 and Schedule, paragraph 12 — Criminal Procedure Code (F.M.S. Cap. 6), ss. 376(i), 417, 418 and 418A — Federal Constitution, art. 145(3).

Constitutional Law — Attorney-General — Powers of — Federal Constitution, art. 145(3).

Dangerous Drugs — Trial of offences — Power of Attorney-General — Dangerous Drugs Ordinance, 1952, ss. 39 and 41A.

The respondents in this case were charged with offences under the Dangerous Drugs Ordinance, 1952 and after preliminary inquiries were held, they were committed to stand trial at the High Court. When the cases came up before the High Court the learned Judge made orders transferring the cases for trial in the Special Sessions Court. The Public Prosecutor applied for the trials in the Special Sessions Court to be stayed and for the learned Judge to refer certain questions to the Federal Court by which in effect the Federal Court was asked to give a ruling whether the learned Judge had power to transfer these cases to the subordinate court and, if so, whether he properly exercised that power.

Held: (1) the transfer of the cases from the High Court to the Special Sessions Court was not proper in the circumstances;

(2) the power of a Judge of the High Court to transfer a case under section 25(2) of the Courts of Judicature Act, 1964 and Item 12 of its Schedule was subject to the discretion of the Attorney-General under Article 145(3) of the Federal Constitution to choose the forum in which persons charged under section 39B(1)(a) of the Dangerous Drugs Ordinance were to be tried; the power conferred under Article 145(3) on the Attorney-General would override the power of the High Court to transfer so that the judge had no power to transfer such cases as the present on his own motion for trial in a subordinate court.

Cases referred to:-

(1) *Damodaran* v. *Vesudevan* [1975] 2 M.L.J. 231.

(2) *Public Prosecutor* v. *Datuk Harun bin Haji Idris* [1976] 2 M.L.J. 116, 119.

The following cases were also cited in argument: *Public Prosecutor* v. *Su Liang Yu* [1976] 2 M.L.J. 128; *Johnson Tan Han Seng* v. *Public Prosecutor and related appeals* [19 2 M.L.J. 66, 70; *Bapoo* v. *Rex* [1935] M.L.J. 19; *Public Prosecutor* v. *Viran* [1947] M.L.J. 62, 64; *Long bin Samat* v. *Public Prosecutor* [1974] 2 M.L.J. 152; *Shell Co. of Australia* v. *F.C.T.* [1931] A.C. 275; *Public Prosecutor* v. *Fan Yew Teng* [1973] 2 M.L.J. 1.

FEDERAL COURT.

Mohamed Nor bin Haji Ahmad for the Public Prosecutor.

V. Muthusamy for the 1st respondent.

Karpal Singh for the 2nd respondent.

R. Rajasingam for the 3rd respondent.

Suffian L.P. (read by Gill C.J. (Malaya) (delivering the judgment of the Court): The first and second respondents were jointly charged with trafficking in 672 grammes of heroin, contrary to section 39B(1)(a) of the Dangerous Drugs Ordinance No. 30 of 1952, an offence punishable under subsection (2) of the same section with death *or* life and whipping. After a preliminary enquiry they were committed to stand trial in the High Court.

The third respondent was charged with trafficking in 2,545.95 grammes of heroin. After a preliminary enquiry, he too was committed for trial in the High Court.

On June 27, 1977, when the cases came up in the High Court, the learned judge made orders transferring them for trial in the Special Sessions Court. He made them of his own motion.

The Special Sessions Court of course has jurisdiction to try these charges but can only sentence the respondents, if convicted, to life and whipping, whereas the High Court can sentence them even to death, if the trial judge thinks such an extreme sentence justified.

The Public Prosecutor was not satisfied with what the learned judge did, so applied — successfully — for the trials in the Special Sessions Court to be stayed and for the learned judge to refer to us under section 48 of the Courts of Judicature Act, 1964, the following questions:

(1) Whether the transfer of [these two cases] on the 27th day of June, 1977, under [paragraph] 12 of the Schedule to the Courts of Judicature Act, 1964, to the Special Sessions Court, Penang, for trial thereat was proper in the circumstances?

(2) Whether the aforesaid [paragraph] of the aforesaid Schedule to the Courts of Judicature Act, 1964, is or is not subject to the power conferred on the Public Prosecutor under Article 145(3) of the Federal Constitution in respect of the conduct of the prosecutions including the choosing of the [forum], after having regard to the circumstances of the case; and whether such power conferred under the said Article 145(3) overrides the power of the High Court Judge to transfer cases [of] his own motion to the Special Sessions Court?

In brief, we are asked to give a ruling on whether the learned judge had power to transfer these cases to the subordinate court, and if so whether he properly exercised that power.

For the Attorney-General it is argued that the learned judge did not have that power, while on behalf of the respondents it is argued on the contrary that the learned judge had the power and rightly exercised it.

It is now convenient to reproduce the relevant legislation.

Article 145(3) of the Constitution reads as follows:

"(3) The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial."

Section 25(2) of the Courts of Judicature Act and paragraph 12 of its Schedule read as follows:

"25(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

12. Power to transfer any proceedings to any other court or to or from any subordinate court, and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof:

Provided that this power shall be exercised in such manner as may be prescribed by any rules of the court."

Sections 376(i), 417, 418 and 418A of the Criminal Procedure Code read as follows:

"376(i) The Attorney-General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.

417. (1) Whenever it is made to appear to the High Court —

(a) that a fair and impartial inquiry or trial cannot be had in any criminal court subordinate thereto; or

(b) that some question of law of unusual difficulty is likely to arise; or

(c) that a view of the police in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same; or

(d) that an order under this section will tend to the general convenience of the parties or witnesses; or

(e) that such an order is expedient for the ends of justice, or is required by any provision of this Code,

it may order —

(aa) that any offence be inquired into or tried by any court not empowered under sections 121 to 126 but in other respects competent to inquire into or try such offence; or

(bb) that any particular case or class of cases be transferred from a Criminal Court subordinate thereto to any other such Criminal Court of equal or superior jurisdiction; or

(cc) that any particular criminal case be transferred to and tried before the High Court; or

(dd) that an accused person be committed for trial before the High Court; or

(ee) that a person committed for trial in one place be tried in another place.

(2) The High Court may make an order under subsection (1) either on the report of the lower court, or on the application of the Public Prosecutor or the accused person, or on its own initiative.

(3) (a) When an order is made under paragraph (cc) of subsection (1) the Lower Court before which the inquiry into, or the trial of, the offence against the accused person is pending shall,

(if the case is triable by the Lower Court) without holding a preliminary inquiry under Chapter XVII; or

(if the case is triable by the High Court and the preliminary inquiry under Chapter XVII is in progress or has not yet commenced when the order is made) without holding or completing such preliminary inquiry,

cause the accused person to appear or be brought before the High Court on the date specified in the said order or as soon as may be practicable if no such date is specified.

(b) When the accused person appears or is brought before the High Court in accordance with paragraph (a), it shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX.

(4) The court to which a case is transferred under this section may act on the evidence already recorded in an inquiry or a trial or partly so recorded and partly recorded by itself, or it may re-summon the witnesses and re-commence the inquiry or trial:

Provided that in any case so transferred the Public Prosecutor or the accused person may, when the court to which the case is transferred commences its proceedings, apply that the witnesses or any of them be re-summoned and re-heard.

418. (i) Every application for the exercise of the power conferred by the last preceding section shall be made by motion which shall, except when the applicant is the Public Prosecutor, be supported by affidavit.

(ii) Every such application shall be made before the inquiry into or trial of the offence had been concluded.

(iii) When an accused person makes an application under this section, a judge may, if he thinks fit, direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the expenses of the prosecution.

(iv) Every accused person making any such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

418A. (1) Notwithstanding the provisions of section 417, the Public Prosecutor may in any particular case triable by a Criminal Court subordinate to the High Court issue a certificate requiring the court before which the case is pending to remove it to the High Court at such place as may be specified in the certificate and to cause the accused person to appear or be produced before the said High Court.

(2) The power of the Public Prosecutor under subsection (1) shall be exercised by him personally.

(3) Upon receipt of the certificate, the court before which the case is triable shall without holding a preliminary inquiry under Chapter XVII transmit the case to the High Court mentioned in the certificate and cause the accused person to appear or be brought before such High Court as soon as may be practicable; and thereafter the provisions of subsection (3)(b) and subsection (4) of section 417 shall apply to such case *mutatis mutandis*."

In our judgment in light of the above provisions the learned judge had no power to transfer these cases to the subordinate court.

It is true that paragraph 12 of the Schedule, read alone, appears to give the learned judge power "to transfer any proceedings ... to ... any subordinate court"; but that paragraph cannot be read alone, it must be read in conjunction with the proviso to section 25(2), so that this power must be exercised "in accordance with any written law or rules of court relating to the same". These words mean, as I stated at page 232 in *Damodaran* v. *Vasudevan*,[1] that if there are written laws or rules of court relating to power conferred on the High Court by the Schedule, it may be exercised only in accordance with them, not otherwise.

In our judgment, there is written law relating to the power of transferring proceedings from the High Court, namely the Rules of the Supreme Court as regards civil and the Criminal Procedure Code as regards criminal proceedings.

As the cases in question are criminal, in our judgment the learned judge could transfer them only in accordance with sections 417, 418 and 418A of the Criminal Procedure Code. From subsection (2) of section 417 it is clear that the High Court may transfer a case on the report of the lower court or on the application of the Attorney-General or, as happened here, on its own initiative; but this is subject to two restrictions. First, the High Court may do so only for the reasons stated in paragraphs (a) to (e) of subsection (1) of section 417, and secondly, the High Court may transfer a case only from a subordinate court to another subordinate court or to itself, but not from itself to a subordinate court.

As to the first restriction, there is no indication that the learned judge was influenced by any of the

reasons stated in subsection (1) and as to the second restriction, the learned judge transferred these cases from the High Court to a subordinate court; so his orders of transfer are not authorized by section 417.

Nor are they authorized by section 418A which only allows transfers from a subordinate to the High Court, and once a case has been so transferred the High Court has no alternative but "to fix a date for [the accused's] trial which shall be held in accordance with the procedure under Chapter XX." This is clear from the words "and thereafter the provisions of subsection 3(b) ... of section 417 shall apply *mutatis mutandis*" in subsection (3) of section 418A. By this section Parliament has given the Attorney-General wide power to transfer cases such as the present ones for trial in the High Court. He could have used this section 418A power here, but did not do so because, we are told by Encik Mohd. Nor, he would use it only in exceptional cases.

We next turn to section 376(i) of the Criminal Procedure Code and article 145(3) of the Constitution.

In our view the words "institute, conduct" in article 145(3) are wide enough to confer on the Attorney-General unfettered discretion to choose in which court, a higher or lower court, to bring persons charged under section 39B(1)(a) of the Dangerous Drugs Ordinance, though of course he does not have nor is it contended that he has, power to choose which particular judge or president should actually try the case. The word "institute" means to set on foot, initiate, start, so that the Attorney-General has power, at his discretion, to initiate a case such as the present ones, before a Special President or a High Court judge. We respectfully agree with Abdoolcader J. when he said at page 119 in *Public Prosecutor* v. *Datuk Harun bin Haji Idris*[2]:

"'Institute' in article 145(3)... must necessarily refer to the commencement of proceedings and prosecutions.... It may well be ... that the Public Prosecutor has power... to direct any case triable in the Magistrate's or Sessions Court to be tried in the High Court after a preliminary enquiry. This power to so direct would, if exercised, fall squarely within his discretion to institute and conduct criminal prosecutions and proceedings."

In view of the large quantity of heroin involved and the serious drug problem that afflicts the young in this country, it is obvious that the Attorney-General thinks that life imprisonment for these respondents will not be sufficient deterrent for other would-be drug traffickers. The Attorney-General has information and sources of information not available to the courts, and possessed of this information he may regard it as his public duty to have these persons tried in a court which has power to pass sentence of death, though that still leaves the trial court free to impose a lesser penalty if it thinks fit, and if he does so, the High Court has no alternative but to try the case.

In our judgment the answers to the questions posed are accordingly as follows:

(1) The transfer of these cases from the High Court to the Special Sessions Court was not proper in the circumstances.

(2) The power of the learned judge to transfer a case under section 25(2) of the Courts of Judicature Act, 1964, and item 12 of its Schedule is subject to the discretion of the Attorney-General under article 145(3) of the Constitution to choose the forum in which persons charged under section 39B(1)(a) of the Dangerous Drugs Ordinance are to be tried; the power conferred under article 145(3) on the Attorney-General overrides the power of the High Court to transfer, so that the judge has no power to transfer such cases as the present of his own motion for trial in a subordinate court.

We therefore order that these cases be transferred back to the High Court for trial therein.

Before departing from this case, mention should be made of the second section 41A of the Dangerous Drugs Ordinance substituted for the first section 41A by Act A426 with effect from March 10, 1978, i.e. between the orders of transfer in question and the hearing of this special case. This section reads:

"41A. (1) Where any case in respect of an offence under this Ordinance is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such court as soon as may be practicable.

(2) When the accused person appears or is brought before the High Court in accordance with subsection (1), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.

(3) The trial of a case transmitted to the High Court under subsection (1) shall be by a judge of the High Court sitting alone, and the provisions of Chapters XXI and XXII of the Criminal Procedure Code shall not apply to such trial.

(4) The provisions of subsections (1), (2) and (3) shall have effect notwithstanding any other written law to the contrary."

So it is obvious that since the enactment of this new section the Attorney-General has power to require these cases to be tried before the High Court and that where he so requires the High Court has no power to return them to the subordinate court but must on the contrary proceed with the trial.

The Attorney-General could have used this new power even without a ruling from this court on the questions referred to us, but nevertheless we have been asked to give a ruling generally, and the ruling we give would have applied to these cases prior to the new section 41A and applies equally to cases not covered by provisions similar to the new section 41A.

Order accordingly.

Solicitors: *V. Muthusamy; Karpal Singh & Co.; R. Rajasingam.*